

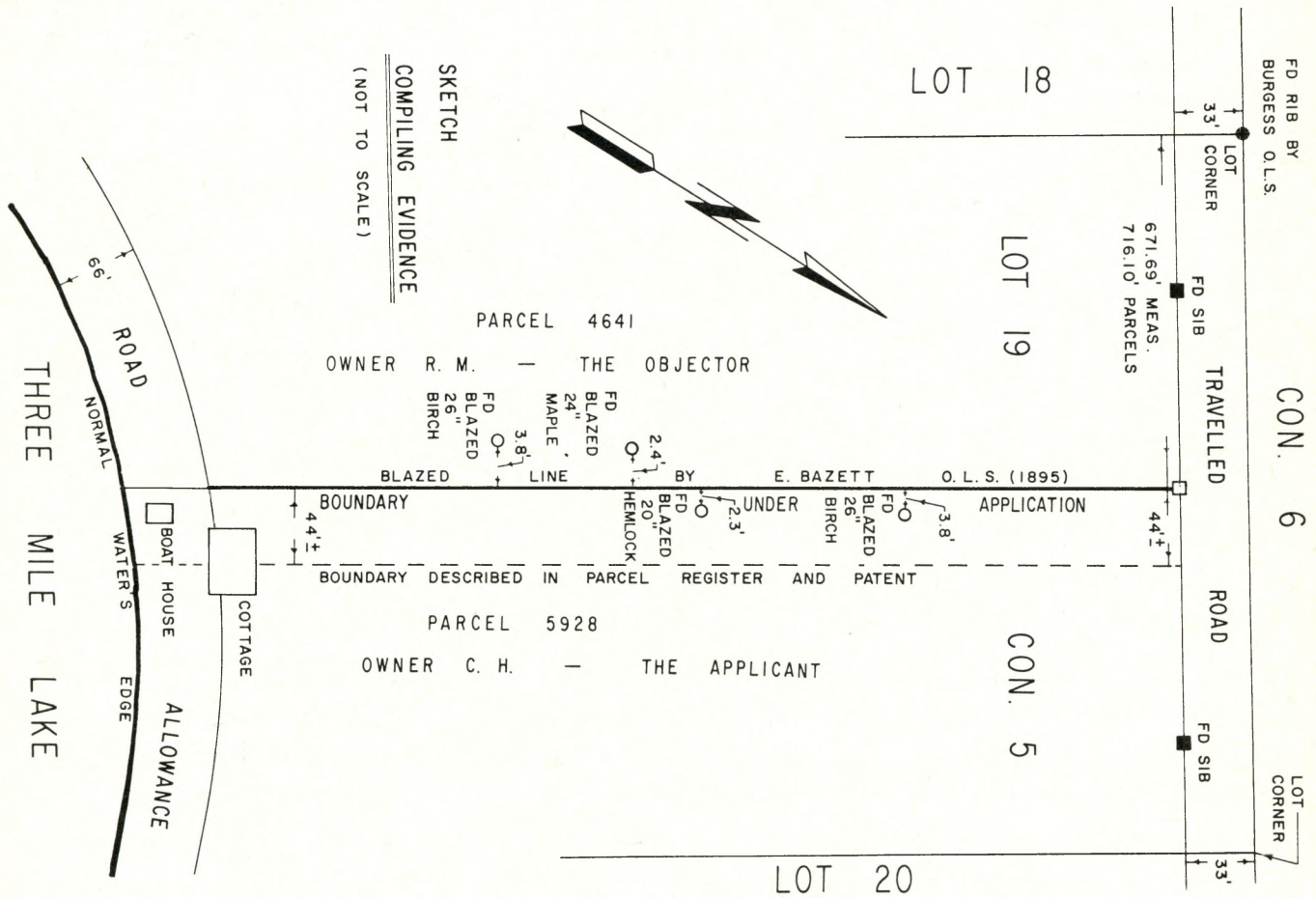


Ontario

Ministry of
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The Boundaries Act



THE BOUNDARIES Act decision reported here came before the Boundaries Act Tribunal in 1977. It again raises the question of a description limit which is different than the physical position of the boundary as found on the ground. In the original survey for the boundary under application in 1895, O.L.S. Bazett attempted to split Lot 19 into the east and west halves. However, when the patent description was written it described a boundary 10 chains 85 links easterly from the westerly boundary of the lot, a line which lies some 44 feet east of Bazett's run line. The problem facing the Boundaries Act Tribunal was to decide, on the evidence presented, if Bazett's line was a valid first running of the line or whether the description boundary as described in the patent, should govern.

The Applicant C. H. is the owner of Parcel 5928, in the east half of Lot 19 and the Objector R.M., who objects to the position of the boundary under application, is the owner of Parcel 4641 in the west half of Lot 19.

The land under Application is part of broken Lot 19 in Concession 5 situated on the north shore of Three Mile Lake. The boundary under Application runs northerly some 2400 feet from the inner limit of the Original 66 foot Road Allowance around the shore of Three Mile Lake to the northerly boundary of the parcel, 33 feet southerly from the line between Concessions 5 and 6 in said Township.

Lot 19 was patented from the Crown and registered under the Land Titles System as the east and west parts by Letters Patent, in 1923, to one J. H. for the west part, and Letters Patent dated in 1927, to one A. V., for the east part. The line dividing the Patents is described in essence therein as being a line parallel to the west limit of Lot 19 and distant 10 chains, 85 links (716.10 feet) measured easterly therefrom. The east and west parts of Lot 19 were subsequently further divided, resulting in Parcel 5928, to the Applicant, out of the east part and Parcel 4641, to the Objector, out of the west part, with

the line dividing their properties being the dividing line between the Patents.

The Applicant's surveyor (Surveyor 1), was placed under oath and reading principally from his Survey Report, dated May 17, 1976, gave evidence as to his method of re-establishing the boundaries under Application. Surveyor 1 gave evidence that in 1974 he was commissioned by the Applicant's solicitor, to survey the boundaries of Parcel 5928. The easterly boundary of the lands had been previously re-established by Surveyor 1 and was accepted in the present survey. Surveyor 1 stated that he attempted to re-establish the westerly boundary of the Applicant's lands in accordance with the description in the parcel register and found that the lands so re-established did not enclose the frame cottage and boathouse owned by the Applicant.

Surveyor 1 testified that he was advised at that time by Mr. W. H., husband of the Applicant, and I quote from the survey report:

"that there had been an old survey line defining the westerly limit of the parcel and that a survey post on this line had been visible at one time just west of the boathouse. I examined the area west of my survey line and located old blazes on trees which I find from their age define a line surveyed by Mr. E. Bazett, O.L.S., in January 1895. The prolongation southerly of the line defined by these blazes passes 4.9 feet westerly from the north westerly corner of the boathouse. Mr. Bazett's field notes indicate that the line he surveyed through the middle of Lot 19 was intended to be equally distant (9.96 chains) from the easterly and westerly limits of Lot 19, (which had not been surveyed or marked at that time)".

Surveyor 1 also in his testimony referred to two plans of survey by E. L. Burgess, O.L.S., dated April 10 and August 8, 1933 which accepted the division of Lot 19 into east half and west half, rather than as described in the Patent descriptions, and divided these halves into 330 foot parcels. It was the further evidence of the surveyor that the westerly part of Lot 19 was occupied in accordance with the Burgess survey, and that the owners considered these lines to define their boundaries, notwithstanding the parcel description frontage of 5 chains 42½ links (358.05 feet), i.e. one half the 10 chains 85 links called for in the Patent.

Based on the foregoing evidence it was the opinion of Surveyor 1 that the original Patentees and subsequent owners considered the line by Bazett, O.L.S. to be the line dividing the east and west parts of Lot 19, and that they had acquiesced to this visible line on the ground. This line as re-established from the evidence, Surveyor 1 accepted as defining the boundary between the lands of the Objector and of the Applicant.

The Objector, R. M., claimed that the true position of the boundary between his lands and those of the Applicant should be in accordance with the parcel description, i.e. 716.10 feet east of the west limit of Lot 19, which would place the boundary approximately 44 feet east of the line and would pass through the easterly part of the Applicant's cottage and to the east of the boathouse, both buildings being situated near the shore of Three Mile Lake.

It was acknowledged by the Applicant's solicitor that the position of the boundary as described in the parcel descriptions was as claimed by the Objector,

but that it was the intention of the original patentees and subsequent owners to take title and occupy to the line by O.L.S. Bazett.

Evidence presented by the Applicant's surveyor of the running of the line by O.L.S. Bazett and evidence in the form of blazes dating back to the Bazett survey was not refuted by the Objector.

Two Affidavits were introduced, one by the daughter of the original patentee to the east part of Lot 19, A. V. and the other by the son of A. V. Both of the Affidavits make reference to a creek, fence, clump of birch trees, and mound of earth on which a survey post was standing until a few years ago. The fence has long since disappeared and the position of the stream cannot now reasonably be re-established, but it would appear from the testimony that evidence of the clump of birch trees, i.e. stumps, and a mound of earth could reasonably be considered to be one and same mentioned in the Affidavits.

Surveyor 1 testified that a production southerly of the line as reconstructed from the blazes he found would pass through that clump of birch trees and the mound of earth, and the assumption can be drawn that the mound of earth and post referred to in the Affidavits was evidence of the line run by Bazett, O.L.S., in 1895.

Testimony of Mr. W. H., the applicant's husband, which was not rebutted, was that until a "few years ago" a hewn four inch square wooden post was, in fact, situate in the mound of earth and the clump of birch trees immediately to the west of his boat house and on the O.L.S. Bazett line as now re-established by Surveyor 1.

In 1946 the Applicant built the cottage presently situated on the lands and it was the testimony of the Applicant, Mrs. C. H. that prior to that time she and the Objector, R. M. walked the boundary between their properties and that R. M. assisted in the selection of a site for the cottage that would be well clear of the line and the cottage was subsequently built in that location.

The Objector did not deny his actions in this respect, but stated that he had no recollection of the actions described by Mrs. C. H. The Objector had previously commissioned Surveyor 2 to define the disputed boundary for him in 1958. This action was taken, he testified, because a hydro line was being run into the subject

properties and he felt that the hydro line cutters were cutting more trees on his lands than on the Applicant's lands. He came to this conclusion by pacing off the appropriate width of his property from a post allegedly planted to the west of the disputed line by O.L.S. Burgess in 1933. Plans of survey by O.L.S. Burgess were filed.

A further observation can be made at this point that even though the Objector's interpretation of the position of the theoretical line was confirmed by the Surveyor 2 survey, he took no steps to bring this to the attention of the Applicant over a period of almost twenty years. In delivering judgement the Tribunal stated:

"It is necessary at this point to address the question as to whether the boundary as described in the title documents is, in fact, a different line than that re-established by Surveyor 1 as shown on the (sketch).

"The Applicant's surveyor acknowledged and I find, as a matter of fact, that the description of the lands in the title document when applied to the ground in the true mathematical sense do, in fact, create a line that would run from a point in the north limit of the parcel some 44 feet east of the line and would pass through the Applicant's cottage at its southern extremity.

"No real evidence was adduced at the Hearing to provide an insight into the intentions of the Crown or the patentees at the time the patents were issued from the Crown and we are forced to look at other actions of the parties in attempting to ascertain what the intent might have been. In this respect we are again drawn to the Affidavits which strongly suggest that the patentees considered the O.L.S. Bazett line to separate their properties, possibly in ignorance of the fact that the theoretical position would place the line elsewhere. This rationale when placed alongside other evidence and testimony submitted to the Hearing strongly suggests to me that the patents from the Crown to J. H. and A. V. were incorrect and did not reflect the intent of the parties to the patents. In short, I find that the boundary between the east and west parts of Lot 19 is incorrectly described in the patents and in the parcel registers.

"Accordingly, I find that the true line dividing said Lot 19 into east and west parts is the line as it has been re-estab-

CANADA'S PIONEER SURVEYORS

The Alberta Tar Sands Story

BY ANDREW GIBSON

NOTE: Some of the following is an undocumented re-creation.

BOADICEA MUSTANG scraped the frost from the north window of the rude sod hut and peered out at the blizzard.

"Snow", she murmured.

She tried again at the east, south and west windows. It was snowing outside all of them, and had been since summer had gone. She remembered the very day - September 21, and she knew that it would snow until March 21. On that day it would change to sleet, the first sign of spring in Alberta.

Alberta, as you may know, is a province in Western Canada.

Red-eyed from weeping and from the smoke from the rude fireplace, she sank on a rude bench and buried her hands in her head.

"I must get a grip on myself", she muttered.

She grasped herself with both hands, hurled herself to her feet, and visually

searched the walls of the hovel, rudely decorated with burlesque-house ads. She gazed upon the daguerrotype of her father, the bust and selected other portions of her mother, the two-pose poster, with number, of her brother.

Her courage returned. She threw back her shoulders, squared her head.

"Fie!", she cried, "on such weakness. Although immured in this hovel, I am still a Dragge!"

The scionperson of a prominent English family, Boadicea Dragge had enjoyed a privileged childhood and adolescence. Indeed, until the age of sixteen, she had barely known her parents. Then, thoroughly finished off, she had left St. Salome's, the famous Girls' School, and had joined the mad whirl of English country life, a dizzy round of croquet, criquet, and badger shoots. Not that her higher education had been neglected - a succession of tutors had given her a thorough grounding in Greek, geometry and survey law, it being her father's dearest wish that she would marry a Greek land surveyor.

It was not to be. She met John Mustang, a young Alberta rancher over in the

lished by Surveyor 1 and shown on the (sketch).

"Notwithstanding my finding as to the true position of the subject boundary, it is essential to review the actions of the Objector, which would tend to support or defeat his claims, testimony, or interpretation with respect to the theoretical positioning of the line. As previously noted herein, the Objector is alleged to have counselled the Applicant with respect to the positioning of her cottage prior to its construction in 1946. By the direct testimony of the Objector he was able to ascertain the approximate position of the theoretical boundary when the hydro line was run in 1958. As also noted herein, subsequent to his findings with respect to the hydro line and the consequent survey by Surveyor 2, the possibility of a discrepancy in the boundary line was not relayed to the Applicant for a period of almost 20 years. It is my opinion that if the Objector was capable of

drawing conclusions with respect to the hydro line run in 1958 on the basis of a survey by O.L.S. Burgess in 1933, he was able with even greater certainty to advise the Applicant of a possible discrepancy in the boundary line in 1946 which moment was only 13 years after the Burgess survey which one is forced to conclude must have been more easily discernable at that time. I therefore rule, pursuant to the law of estoppel and laches, that the Objector is doubly barred from disputing the boundary under Application at this time.

"Having given full consideration to all the evidence before the Hearing, I am satisfied that the Applicant's surveyor has correctly re-established the boundaries under Application as shown on the (sketch)."

*Confirmation and Condominium Section,
Legal and Survey Standards Branch,
January 1983.*

old country on a bull buying venture (in the early days Canada was only half full of it). She fell in love with him. His blue eyes spoke to her of the illimitable space of the Alberta ranch country. His gracefully bowed legs spoke to her of a carefree life in the saddle. Otherwise he said little, so different in that respect from the Greek surveyors paraded before her by her father.

Brooking no opposition, they had trothed their plight. After a month of mal-de-mer and two weeks of mal-de-CPR, the young couple de-trained at Low River, Alberta. From it, the horizon stretched, flat as a flounder, in all directions except for one large bump, the previously mentioned rude sod hut, and innumerable small ones, the cattle of the 10,000 acre Mustang spread.

It was a shock to Boadicea, already in a weakened condition from mal-de-CPR. She had expected a gracious mansion, similar to the one she had left at Upside Downs, Hants., But, Dragge that she was, she hevelled herself, carried her six steamer trunks inside (John, like most Canadian males, had a bad back), and set about making the hovel into a home.

Now, six months later, her spirits had sunk. They had gone down for the third time. John was away almost all of the time, out on the range with the cattle. Even when he was home, he spoke only in monosyllables, such as SHUT UP. There was little other human contact - a politician had come to harangue her about Social Credit, a Fuller man had sold her a sod brush. The letters that she got from Upside Downs only served to increase her loneliness. Then, on the stroke of midnight September 21, winter had arrived. The weeks passed. It was Christmas Eve. That's where we came in.

The Christmas tree that she had nailed together out of old branches stood forlornly on the corner. Loining her girds, she decorated it with real snow and real icicles, nailed on the candles and lit them. Then, placing her gift to John, "The Girlhood of Queen Victoria, Vol. 1", under it, she sat down to await midnight.

She was awakened by a combination of (a) the crackling of flames, (b) the shriek of a train whistle, and (c) a pounding on the door. The Christmas tree and the sod wall adjacent to it were in flames! Smoothing her hair, she opened the door.

"Faith, macushla dharlin", said the young man who stood there with a CPR fire extinguisher, "your wall is on fire. With your permission, I'll put it out." ▶